89-1307

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

MR. W FIREWORKS, INC.,

Petitioner,

v.

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Jonathan R. Harkavy
P.O. Drawer Y
Greensboro, NC 27402
(919) 274-2992

Counsel of Record

Of Counsel:

Norman B. Smith
Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence
P.O. Drawer Y
Greensboro, NC 27402

L. Bruce Fryburger
1661 Frost Tower
San Antonio, TX 78205

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-5574

ELIZABETH DOLE, Secretary
of Labor, United States
Department of Labor,

Plaintiff-Appellee,

versus

MR. W FIREWORKS, INC.,

Defendant-Appellant.

Appeal from the United States District
Court for the Western District of Texas

(November 16, 1989)

Before GARWOOD, JONES, and SMITH, Circuit Judges.

GARWOOD, Circuit Judge:

This is yet another chapter in the ongoing battle between the Secretary of Labor (Secretary) and Mr. W Fireworks, Inc. (Mr. W) over the application of the Fair

Labor Standards Act, 29 U.S.C. § 201, et seq. (FLSA), to the operators of Mr. W's roadside fireworks stands. The facts and earlier proceedings are set forth in detail in our opinion on the prior appeal in this case, Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir.), cert. denied, 108 S.Ct. 286 (1987). However, a short summary is in order here. Mr. W is a closely held family-owned corporation that owns over one hundred roadside fireworks stands scattered across South Texas. The fireworks business is seasonal by nature, since Texas law permits fireworks sales only during two limited periods around New Year's Day and July 4. In the normal course of its business, Mr. W procures land, checks local fireworks ordinances, conducts market surveys, builds the stands, and transports them to their sites, where most remain throughout the year. It also procures

licenses and insurance, purchases fireworks inventories, pays for electrical service to the stands, places advertisements in newspapers, and recruits operators for the stands.

These operators are the focal point of this ongoing dispute. In November 1983, the Secretary filed suit alleging that Mr. W. had failed to compensate these operators as required by the minimum wage and overtime provisions of the FLSA. Mr. W countered by claiming that the operators were independent contractors, and thus not subject to the FLSA. The district court agreed, finding that the operators were independent contractors. In our prior decision, we reversed and held that the stand operators were employees of Mr. W. Id., 814 F.2d at 1054. However, we remanded the case to the district court for consideration of Mr. W's claim that its

operators/employees were otherwise exempt from the FLSA under the terms of that statute and, if not, for computation of the proper back pay award to those employees. On remand, the district court held that Mr. W was not otherwise exempt from the FLSA and awarded back pay totaling $225,423.61 plus interest. This appeal followed.

Discussion

I. Exemptions to the FLSA

Mr. W contends that its stand operators are exempt from the provisions of the FLSA under the "amusement or recreational establishment" exemption of 29 U.S.C. § 213(a)(3), as well as the "highly compensated administrative employees" exemption set forth in 29 U.S.C. § 213(a)(1). We find no merit in either argument.[1]

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[1]Mr. W also contended that its stand operators were exempt from the FLSA on the basis of the "outside salesmen" exemption

A. Amusement or recreational establishment exemption

Section 213(a)(3) of 29 U.S.C. provides that the minimum wage requirements of the FLSA do not apply to

> "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or nonprofit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year ...."

It is undisputed that Mr. W meets the "seasonality" requirement of this subsection. The only remaining question is whether Mr. W qualifies as an "amusement or recreational establishment." Unfortunately, this term is not defined in

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(29 U.S.C. § 213(a)(1)). However, Mr. W has abandoned this argument on appeal.

the statute, and the legislative history is far from clear.[2]

We begin with the well-settled rule that courts should construe exemptions to the FLSA narrowly, and that the employer has the burden of proof to show that it is entitled to the exemption. Arnold v. Ben Kanowsky, Inc., 80 S.Ct. 453, 456-57 (1960). Our review of the record in the instant case convinces us that the district court did not err in determining that Mr. W failed to meet this burden. In our most recent decision concerning the "amusement or recreational establishment" exemption, we held that a marina that derived most of its income from boat, motor, and trailer

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[2]We have previously noted that the task of interpreting the exemptions to the FLSA is made more difficult by the absence of a unifying principle underlying the exemptions, and that the exemptions seem to have been created merely to ensure the FLSA's passage. Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1117 (5th Cir.), cert. denied, 95 S.Ct. 175 (1974).

sales did not qualify. Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, 1119-20 (5th Cir.), cert. denied, 95 S.Ct. 175 (1974). Although we observed that the legislative history was "skimpy," we held that it did suggest the exemption was not intended to cover establishments whose sole or primary activity is selling goods. Id. at 1118.

Our decision in Texas City Dike also underscored the point that the exemption was designed solely for those establishments whose sales were intended for consumption in a "geographically delimited recreational area," id. at 1119.[3] Of the establishments that have qualified for the exemption (golf course pro shops, baseball parks, amusement parks, racetracks, summer

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[3]The Texas City Dike marina did not service such a limited area, since it catered to boaters and fishermen across a wide area of the Gulf of Mexico. Id. at 1120.

camps, dry goods stores in national parks), each serves a well-defined area. See id. at 1119, nn. 10-14. Although it is possible for consumers to purchase goods at some of these establishments for consumption elsewhere (i.e., golf balls purchased at a pro shop), sale for consumption elsewhere is not the establishment's primary purpose and usually will make up only a small fraction of its business.[4]

In Texas City Dike, we expressed our concern that permitting every seaside merchant to claim the exemption would result in the exemptions swallowing the rule. Id. at 1119. Mr. W concedes that the various other roadside stands common throughout Texas (i.e., purveyors of fruit,

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[4]The prices at these establishments are usually well above the general retail prices for the same item, taking advantage of the consumer's immediate need for the product being sold as well as the absence of an alternative source.

vegetables, seafood, tamales, flags, bird houses, games, toys, portraits of Elvis on black velvet, etc.) are subject to the terms of the FLSA. Although Mr. W's products provide amusement, this fact does not distinguish Mr. W from the retailers of other seasonal and recreational items, such as fishing tackle, shot gun shells, or ski equipment. The district court could legitimately conclude that Mr. W had not shown that it was other than simply a retail merchant selling tangible personal property primarily for use by the purchasers at locations substantially removed from and functionally unrelated to the location of Mr. W's diverse roadside places of business. The Sixth Circuit noted in Homemakers Home & Health Care Services v. Carden, 538 F.2d 98, 101 (6th Cir. 1976), that exemptions to the FLSA are to be "limited to those establishments

plainly and unmistakably within [the FLSA's] terms and spirit" (emphasis added). While we might not put the matter quite so strongly, it is nevertheless clear the exemptions are to be strictly construed, with the burden being on the party asserting an exemption. We conclude that the district court did not err in determining that Mr. W had not established entitlement to exemption as "an amusement or recreational establishment."

B. The administrative personnel exemption

Mr. W's second contention is that its stand operators are exempt under the "highly compensated administrative personnel" exemption of 29 U.S.C. § 213(a)(1). However, the district court, following our earlier remand, ruled against Mr. W on its claims for exemption from the FLSA on July 15, 1987, and Mr. W did not raise its

"administrative personnel" claim until it moved to amend its answer under Fed.R.Civ.P. 15(a) on February 16, 1988, over seven months after the district court's earlier ruling. Mr. W waited even longer (until Jun 1, 1988) to move to amend its answer to conform to the evidence under Fed.R.Civ.P. 15(b), and did so only as an additional effort to claim the "administrative personnel" exemption. The district court denied both motions.

Regarding Mr. W's Rule 15(a) motion, we note that the standard of review for a decision to grant or deny leave to amend is whether the district court abused its discretion. Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530, 534 (5th Cir.), cert. denied, 101 S.Ct. 608 (1980). We find no abuse of discretion here. Although the language of Rule 15(a) states that leave to amend "shall be freely

given when justice so requires," justice does not so require in the instant case. Mr. W's motion, pared to its fundamentals, is simply an effort to try the matter of exemptions once more, and the district court did not abuse its discretion in refusing this request.

Mr. W's claim under Rule 15(b) is equally meritless. While it is correct in its argument that an issue is treated as if it were raised in the pleadings if the parties consented to try the issue, Metropolitan Life Ins. Co. v. Fugate, 313 F.2d 788, 795 (5th Cir. 1963), there is no indication that the Secretary actually consented to try the issue of "highly compensated personnel" in the present case. The evidence that Mr. W alleges to have shown implied consent was also relevant to the other issues at trial and cannot be used to imply consent to try the present

issue. Jiminez v. Tuna Vessel "Granada," 652 F.2d 415, 421 (5th Cir. 1981). No good cause was established for the distinctly belated raising of the "highly compensated personnel" exemption claim and the district court did not abuse its discretion in denying it.

II. Damages and the "cash advances"

We now address the issue of damages. The district court ordered Mr. W to pay the stand operators the sum of $225,423.61 plus interest as back pay.[5] However, Mr. W contends that it made "cash advances" to

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[5]The Secretary computed the unpaid minimum wages and overtime to total $260,063.69. As requested by Mr. W, the district court deducted $15,889.78 on the basis that the operators owed Mr. W this amount, and also deducted $18,750.30 based on the two year statute of limitations because Mr. W's violations had not been willful (29 U.S.C. § 255 provides a two year statute of limitations for nonwillful violations. See McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677 (1988)). The Secretary challenges neither of these deductions on appeal.

the operators/employees amounting to nearly $160,000, and that the Secretary wrongfully credited it with only half this amount. Mr. W argues that the district court erred in not also deducting this $80,000 (the portion of the $160,000 "cash advances" for which the Secretary did not give credit) from the total back pay award.[6]

It is first necessary to explain the term "cash advances," for in the context of this case it does not refer to advances in the traditional sense of that word, but instead refers to a particular aspect of Mr. W's system for compensating the stand operators. At the beginning of the sales season, each operator receives a quantity of inventory. At the end of the season,

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[6]Mr. W also contended that it was entitled to a deduction of approximately $60,000 as an "exclusion of ten (10) hours as off-duty time." However, the district court rejected this argument and Mr. W does not contest that ruling here.

any remaining unsold inventory is returned to Mr. W. The dollar value of the ending inventory, based upon the suggested retail price, was then subtracted from the dollar value of the total deliveries from Mr. W to that particular stand. This difference is presumed to have been sold by the operator. For instance, if an operator begins with $10,000 worth of fireworks and returns $3,000 worth at the end of the season, that particular stand has presumed sales of $7,000. Mr. W calculates each stand's commission from this figure. In our hypothetical, the operator's commission would equal fifteen percent of the $7,000 presumed sales, or $1,050. However, Mr. W does not simply issue a check for this $1,050. While operators are generally expected to turn over all cash received to Mr. W (which should, in theory, equal the

amount of presumed sales),[7] not all operators do so.[8] For instance, in our example, the operator may turn over only $6,500. The difference between the presumed sales ($7,000) and the amount actually turned over ($6,500) is the amount considered to be the "cash advance." In our illustration, this "cash advance" equals $500. When Mr. W pays the commission due (here, $1,050), it subtracts the "cash advance" from the total commission. Here, Mr. W would pay our hypothetical operator $550 in respect to his commission ($1,050 total commission

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[7]For purposes of this hypothetical, we will ignore state sales taxes.

[8]In fact, some operators took their entire commissions out of the sales receipts before the end of the sales season with the intent that Mr. W. would owe them nothing at the time it paid the final commissions. Mr. W did not object to this practice, as long as the operators did not withdraw funds in excess of their commissions.

less $500 "cash advance").

In making its initial calculations, the Secretary disallowed one-half of each operator's cash advance across the board and without any individualized consideration. The district court accepted the Secretary's figures. However, the evidence in the record indicates that this was clearly erroneous. Many of the operators' "settlement sheets" include notations stating that the operators had taken the entire permitted cash advance for their own use.[9] For instance, of the more than ninety settlement sheets for the 1987 summer season, all but seven contained such notations. Although these notations were apparently prepared by Mr. W, nothing in the record positively states this fact, and

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[9]This notation reads as follows: "[A]mount of advances representing cash which operator acknowledges withdrawing for its own use __[amount filled in]__."

even if they were prepared by Mr. W, the district court made no direct (or even implied) statement that would indicate that these notations lacked credibility. Furthermore, Mr. W also introduced acknowledgements, signed by the operators themselves, that the operators had taken the cash advance money. These acknowledgements said:

> "I, (operator), ran a Mr. W Fireworks, Inc. stand at (location) the season of (season). On my settlement sheet the (amount) of advances reflects (amount) that I took out of the cash receipts for my personal use or labor or expenses."

Although these acknowledgements state that the money was taken for "personal use or labor or expenses," we held in our prior opinion that the expenses in running the stands (i.e., general maintenance, purchase of hay to cover muddy areas in front of the stands, etc.) were indisputably minimal. Id., 814 F.2d at 1048-49. Regarding the

other two allocations (personal use or labor), Mr. W is entitled to credit for both. It is undisputed that Mr. W. is entitled to receive credit for money taken by the operators for their own personal use, and also that Mr. W is entitled to credit for money used by the operators to pay for assistants, because the pay due to these assistants was factored into the Secretary's initial calculations. Because it was error for the district court to simply accept the Secretary's initial figures at face value, given the record evidence, we reverse the back pay award and remand for further proceedings consistent with this opinion.[10]

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[10]On the basis of the evidence adduced at the May 4, 1988 back pay hearing, it appears that the cash advance money may be allocated roughly (and given the general lack of record keeping by both Mr. W and the operators, we stress "roughly") in the following manner:

For the foregoing reasons, the judgment of the district court is

AFFIRMED in part, REVERSED in part, and REMANDED.

Expense	Percent
Personal Use	17
Pay to Assistants	35
Stand Improvements	3
Unspecified	45

While the idea of splitting the advance money fifty-fifty has some appeal, under the record and extant findings this method of division could not properly be applied except possibly to that portion of the advance the use of which was not shown. On the basis of the above percentages, this means that the court should have permitted the Secretary to disallow no more than approximately one-quarter of the total cash advance figure, rather than one-half. However, we do not mandate that the district court rigidly apply these numbers on remand. Since the court made no findings regarding the credibility of the settlement sheet notations or the operators' signed acknowledgements, the amount disallowed may well be less than the one-quarter discussed above.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jul 15 1987
Charles W. Vagner,
Clerk]

WILLIAM E. BROCK, Secretary of Labor, U.S. DEPARTMENT OF LABOR, Plaintiff,	*	SA-83-CA-2548
v.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

MEMORANDUM OPINION AND ORDER

On January 29, 1986, this Court entered its Judgment in defendant's favor, having found that the operators of defendant's fireworks stands were independent contractors not protected by the provisions of the Fair Labor Standards Act (FLSA). The Fifth Circuit Court of Appeals reversed, concluding that the operators were employees within the meaning of the FLSA. The case was remanded to determine whether defendant was exempt from coverage

under the "amusement or recreational establishment" exemption (29 U.S.C. Section 213(a)(3)) and the "outside salesman" exemption (29 U.S.C. Section 213(a)(1)). The parties were ordered to brief the exemption issue, and inform the Court whether additional evidence needed to be taken. The briefs have been filed and it appears no further hearings are necessary. Having reviewed the arguments, the trial testimony, and the applicable law, the Court is of the opinion defendant is not exempt from compliance with the FLSA.

The employer asserting exemption from the application of the FLSA has the burden of proving entitlement to that exemption. Brennan v. Texas City Dike and Marina, Inc., 492 F.2d 1115, 1117 (5th Cir.), cert. denied, 419 U.S. 896 (1974). An exemption from the FLSA must be narrowly construed and should not be applied unless the

employer plainly and unmistakably fits within its terms and spirit. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945). For the amusement or recreational establishment exemption to apply, the business must be (1) seasonal and (2) recreational. Brennan v. Texas City Dike and Marina, Inc., at 1117. The Secretary of Labor does not dispute that Mr. W Fireworks meets the seasonality requirement. In the Texas City case our Court of Appeals examined the legislative history of Section 213(a)(3) and concluded that the exemption does not cover establishments whose sole or primary activity is selling goods, unless the enterprise is an integral part of a supervised, geographically delimited recreational area or establishment. Id., at 1118. Typical examples of such are the concessionaires at amusement

parks and beaches. 29 C.F.R. Section 779.385.

The facts in this case are clear that defendant's stand operators exclusively engage in the sale of merchandise, primarily fireworks. It is also undisputed that defendant's fireworks' stands are located at various points on the side of a highway and are not part of any larger amusement area. In Texas City the employer had a multifaceted business, providing both goods and services to the public. In that situation the Court of Appeals applied a principal activity test to determine whether the exemption could be applied. Mr. W Fireworks, on the other hand, dealt only in the sale of goods. Since defendant provides no amusement or recreation services, the Court must find that it is not entitled to the Section 213(a)(3) exemption.

Neither can defendant's employees at the fireworks stands qualify as "outside salesmen" under Section 213(a)(1). An "outside salesman" must be engaged in activities away from the employer's place of business. Brennan v. Modern Chevrolet Co., 363 F.Supp. 327, 331 (N.D. Tex. 1973), affirmed, 491 F.2d 1271 (5th Cir. 1974). See, 29 C.F.R. Section 541.500. FLSA regulations, adopted pursuant to an express delegation of authority to the Secretary of Labor by Congress, become, in effect, a part of the statute and have the force and effect of law. Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249, 260 (5th Cir. 1969). Further examination of the applicable regulations is, therefore, instructive. 29 C.F.R. Section 541.502 states that characteristically, an "outside salesman" is one who makes his sales at his customer's place of business. It further

says that any fixed site used by a salesman as a headquarters must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property.

First, it should be noted that the fireworks stands are defendant's property. They are constructed at defendant's expense, and then transported to the site leased by defendant. Second, the stand operators sell all of the fireworks from a fixed site, the stand itself. Finally, none of the operators makes the sales at the customer's home or place of business. The Court concludes that the fireworks stands are defendant's places of business, and that the stand operators are not, therefore, "outside salesmen".

It is therefore, ORDERED that defendant's request for exemption from coverage by the FLSA is OVERRULED.

SIGNED this 15th day of July, 1987.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Mar 28 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor	*	
	*	SA-83-CA-2548
Plaintiff,	*	
vs.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

ORDER

On this day came on to be considered defendant's motion to amend its answer to add another defense, filed February 16, 1988. Judgment for defendant was entered herein on January 29, 1986, and was reversed April 20, 1987. On June 1st, the parties were ordered to brief the applicability of the "amusement or recreational" establishment exemption and the "outside salesman" exemption to the Fair Labor

Standards Act, which were raised in defendant's amended answer prior to the first trial. On July 15th, the Court ruled that neither exemption applied to defendant. Since that time, the parties have been preparing for the damage phase of trial; discovery has been extended and the damages hearing has been set and reset at the parties' request on more than one occasion. In its Order of January 27, 1988, the Court continued the case until May 4th but stated that no further requests for continuance would be entertained.

Defendant's motion to amend its answer to add another defense is untimely. The defense could have been presented either before trial or at the time the other exemptions were addressed on remand. Defendant waited until discovery on the damages phase was completed and the case was set for trial before asking to amend.

The liability phase is over and only damages remain to be determined.

It is, therefore, ORDERED that defendant's motion to amend its answer is DENIED.

SIGNED this 20th day of March, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, Secretary of Labor, United States Department of Labor	*	
Plaintiff,	*	SA-83-CA-2548
vs.	*	
MR. W FIREWORKS, INC.	*	
Defendant.	*	

ORDER

On this day, came on to be considered the motion of defendant to amend its answer to conform to the evidence. For reasons previously expressed, the motion shall be DENIED.

It is so ORDERED.

SIGNED this 14th day of June, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, *
Secretary of Labor, *
United States *
Department of Labor *
* SA-83-CA-2548
Plaintiff, *
vs. *
*
MR. W FIREWORKS, INC. *
*
Defendant. *

MEMORANDUM OPINION

Liability of defendant to pay its employees minimum wage as required by the Fair Labor Standards Act, Title 29 U.S.C. Section 201 et seq., having been established, a hearing to determine the amount of damages was conducted. Having considered the evidence presented at the hearing, as well as the applicable law, the Court now renders its decision.

The following factors, among others, were considered by the Court in determining

the amount of wages owed to defendant's employees in this case. Defendant is in the business of selling fireworks during two separate seasons of the year. The summer season is eleven (11) days long, and the winter season is thirteen (13) days long. The fireworks stands were generally open between 9:00 a.m. and midnight each day of the sale season at the defendant's suggestion. Pursuant to State law and defendant's contractual arrangement with its employees, the stand operators were required to be present at the stands 24 hours a day. Operation of the stands required the labor of the stand operator and others recruited by the operator to assist in firework sales. Stand operators enlisted the aid of relatives and friends to operate the stands. At the larger stands, six (6) or more persons were present each day for various numbers of

hours. Even at the smaller stands, the stand operator was assisted by at least one (1) and often more individuals. During the busiest days of the season, December 24th and 31st and July 3rd and 4th, additional workers were employed. All persons employed by the stand operators were hired at the expense of the stand operators.

Under their contract with defendant, stand operators were to be paid a 15% commission on fireworks sales. However, the amount of money actually received by the operators was often far less than fifteen percent of the sales. The "Commission Agents Settlement Sheet" prepared by defendant shows how defendant computed the commission due to a stand operator. The "Total Charges" at the top of the settlement sheet is the dollar figure representative of the amount of merchandise given to a stand operator for

sales throughout the sales season. The "Closing Inventory" is the dollar figure representative of the amount of merchandise returned to defendant at the end of the sale season by the stand operator. The difference between these figures is reflected in the "Taxable Sales" category. Sales tax is added to that figure. The "Cash Received" from the stand operator is deducted from the total amount to be collected from him or her. Defendant lists this difference as an "Advance." The advance is deducted from the fifteen percent of the taxable sales to give the amount due the stand operator.

Plaintiff has submitted her back wage computation of the amount of standard and overtime wages due from defendant to its employees. Plaintiff calculated back wages based on 172 total operator hours for the winter seasons and 148 operator hours for

the summer seasons. These figures are based on thirteen 12-hour work days for the stand operator in the winter seasons and eleven 12-hour work days for the stand operator in the summer seasons plus two 8-hour days, one to set-up and one to close down the stand. Plaintiff's formula also considers the necessity of hiring at least one additional helper per stand which was paid for by the stand operator; therefore, there are thirteen 4-hour days of helper work for the winter seasons and eleven 4-hour days of helper work for the summer seasons, which amounts must be added to the money due the stand operator for his work.

The evidence supports these figures. Gerard Rodriguez, a stand operator in the summer of 1987, testified that he was at the stand 24 hours a day every day except for a 2 to 3 hour period during which he went to his home. He testified that 3

other persons helped most of the time, at 12 hour shifts. It took 8 to 12 hours for Rodriguez and another individual to set up the stand, and 10 hours for Rodriguez and 2 others to clean up, count the inventory and coupons, take down the stand and return everything to defendant. Ramona Wessels testified that it took 4 to 6 hours for her, her husband and her daughter to set up the stand, and a like amount of time to close the stand. She worked 8 to 10 hours per day and slept in a camper at the stand site. Her husband and daughters worked a combined total of 14 to 17 hours per day, and longer hours on the busier days. Sharon Welch, a stand operator for three seasons, testified that it took 12 hours for 2 persons to set up the stand. She stayed at the stand 24 hours a day and slept in the travel trailer she owned. Her husband was with her every day, as were

four other persons who worked approximately 6 hours each. During the second week of the winter season, more persons were needed to work longer hours. On December 24, 1986, nine people worked 8 hours each, and on December 31, 1986, twenty-two people worked 12 hours each. David Velasquez, an operator in the winter season of 1986-1987, testified that he remained at the stand 24 hours a day but for 1 1/2 to 2 hours to go home for a shower. Several persons worked 4 hours a day during most of the season, and additional persons worked longer hours on Christmas Eve and New Years Eve.

The 4-hour days for helpers can be justified in either one of two ways. If considered in addition to the operator's 12-hour day, a 16-hour day is created. Although the stands were generally open from twelve to fifteen hours per day, the stand operators were obligated by State law

and by defendant to remain at the stand 24 hours per day, and were available to sell fireworks at any time during that 24 hour period. Courts have recognized that "waiting time" may also be "working time" for purposes of the FLSA. Skidmore v. Swift & Company, 323 U.S. 134, 136, 65 S.Ct. 161, 162, 89 L.Ed. 124 (1944). Brock v. El Paso Natural Gas Company, 644 F.Supp. 1202, 1206 (W.D. Tex. 1986). In each case, the Court must resolve the question whether the employee was engaged to wait, or whether he is waiting to be engaged. Skidmore, 323 U.S. at 137, 65 S.Ct. at 163. As in Brock, defendant's employees were restricted in their movements to the extent that they could not leave their assigned station without first making arrangements for a replacement. During these periods of time, the employee is on duty, his duty being to stand and wait. See, Brock, 644

F.Supp. at 1207. When "idle time" is spent predominately for the benefit of the employer, not the employee, such time is compensable under the terms of the FLSA. Ibid. Therefore, the requirement that the stand be manned 24 hours per day justifies payment of wages for a 16-hour day. Additionally, the evidence is overwhelming that more than one helper worked at the stands at the same time as the operator. Even if the stand was operated only 12 hours per day, in almost every case, more than 16 hours of work was performed.

In determining whether the operator was due back wages based on the plaintiff's formula, the amount of money actually received by the operator had to be determined. The amount of money actually received by the operator is referred to as the operator's "net commission." The net commission was determined by subtracting

one-half of the amount of the "advance" from the figure representing the 15% commission on sales found on settlement sheets. Once the operator's net commission was determined, the figure was divided by the applicable number of hours for the season to determine the operator's regular rate of pay. If the regular rate of pay was less than the minimum wage, the operator was due an amount equal to the minimum wage and overtime for all hours worked. If the regular rate of pay was more than the minimum wage, the operator was due overtime compensation at one and one-half times his regular rate of pay. The operator was also due reimbursement for helper pay at the rate computed.

Defendant contends that the full amount of cash advances should have been allowed as credits, instead of only 50%. The Court does not agree. Much of the

evidence concerning these "advances" was conflicting. It is defendant's contention that these "advances" were sums withdrawn by the operators for their personal use. While there is evidence to support this position to an extent as to some operators, more evidence supports the view that the money attributed as an "advance" was either used to pay stand expenses or was otherwise unaccounted for. Gerard Rodriguez testified that any money he withdrew from the fireworks' sales was replaced, and that beer and barbecue were not paid for from the fireworks' money. Ramona Wessels testified that her "advance" represents cash she used to pay employees, for stand expenses, as well as for personal use. Sharon Welch could not explain what her "advance" represented. She testified that the only money she withdrew from the fireworks' sales was for stand expenses

such as hay, butane for her trailer, a portable toilet, and to pay her employees. David Velasquez took money for caulking and plastic to prevent water from leaking into the stand. He also purchased hay and food. He also testified that he believed he was made to pa for fireworks damaged by water leaks. Other witnesses also testified that money was withdrawn to pay employees, for stand expenses and for personal expenses. Most operators testified that there were no thefts or inventory discrepancies.

The Court believes the evidence justifies deduction of one-half of the amount of the "advance." When an employer has failed to maintain the payroll records required by the FLSA, the employees' initial burden is to make out a prima facie case that the FLSA has been violated and to produce some evidence to show the amount and extent of the violation. Beliz v. W.

H. McLeod & Sons Packing Company, 765 F.2d 1317, 1330 (5th Cir. 1985). An employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 687-688, 66 S.Ct. 1187, 1192-1193, 90 L.Ed. 1515 (1946). The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. Ibid. If the employer fails to produce such evidence, the Court may then award damages to the employee, even though the result be only approximate. Ibid. Beliz, 765 F.2d at 1330-1331. This Court believes that

plaintiff has satisfied her burden. It thus becomes defendant's responsibility to produce evidence which would negate the reasonableness of the inference to be drawn from the plaintiff's evidence. Defendant has not done so. The evidence in some situations would justify deduction of the entire amount of the "advance" as an improper charge against the stand operators. Plaintiff's formula, deducting only one-half of the "advance" is reasonable.

According to plaintiff's computations, the total amount of unpaid minimum wages and overtime compensation amounts to $260,063.69. Defendant contends that several figures must be deducted from this amount. Defendant asserts that approximately $80,000 which represents one-half of the cash advances disallowed by plaintiff in its computations, must be subtracted. It also argues that approximately $60,000,

which represents an exclusion of ten (10) hours as off-duty time, must be deducted. The Court has previously addressed the issues of advances and off-duty time, and these objections are overruled. Defendant also contends it is entitled to credit for $3,784.84, representing imputed wages claimed for operators who owed defendant money at the end of the season, $2,675.72, representing portable toilet and trash collection charges already considered by defendant, and $9,429.22, representing clerical errors. The objections shall be sustained and these amounts, totalling $15,889.78, shall be deducted from plaintiff's computations.

The final area of dispute concerns $9,427.41 due for the winter season of 1980-1981, and $9,322.89 for the summer season of 1981. This lawsuit was filed in November, 1983, and defendant claims that

these seasons are not within the two-year limitation period prescribed in Title 29 U.S.C. Section 255. Plaintiff responds that defendant's violations were "willful", thus permitting application of the three-year statute of limitations. In McLaughlin v. Richland Shoe Company, 56 U.S.L.W. No. 44, p. 4433 (decided May 16, 1988), the United States Supreme Court defined willfulness under the FLSA as meaning that the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the FLSA. The Supreme Court rejected the Jiffy June standard previously applied in the Fifth Circuit, which merely required that an employer know that the FLSA was "in the picture." The Supreme Court rejected the Secretary's proposed standard that would permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a

completely good-faith but incorrect assumption that a pay plan complied with the FLSA.

In the case at bar, the basis for denying liability was defendant's belief that its stand operators were independent contractors, not employees. Even this Court initially shared this view. Defendant's rejection of the Secretary's argument to the contrary, was a good-faith but incorrect assumption. Therefore, this Court concludes that defendant's actions were not willful and that the two-year statute of limitations must be applied. The sum of $18,750.30, which represents the amount of wages due for the two seasons in dispute, shall also be deducted from plaintiff's computations.

It is so ORDERED.

SIGNED this 14th day of June, 1988.

s/ H. F. Garcia
H. F. Garcia
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[**FILED** Jun 14 1988
Charles W. Vagner,
Clerk]

ANN MCLAUGHLIN, *
Secretary of Labor, *
United States *
Department of Labor *
* SA-83-CA-2548
Plaintiff, *
vs. *
*
MR. W. FIREWORKS, INC. *
*
Defendant. *

JUDGMENT

In accordance with the Memorandum Opinion being entered contemporaneously herewith;

It is ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is RESTRAINED from withholding minimum wage and overtime compensation from its employees in the amount of $225,423.61, plus interest from the date such wages became due at the rate provided by Title 26 U.S.C. Section 6621, until the date of

entry of judgment, plus post-judgment interest at the rate of 7.59% and plaintiff's costs of court.

It is further ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is, RESTRAINED from refusing or failing to pay its employees minimum wage and overtime compensation as provided by law.

It is further ORDERED that defendant Mr. W Fireworks, Inc. be, and it hereby is, RESTRAINED from failing to make, keep and preserve records of any employees who work in its fireworks sales stands and of the wages, hours, and other conditions and practices of employment maintained by it.

SIGNED this 14th day of June, 1988.

s/H. F. Garcia
H. F. Garcia
U.S. District Judge

The foregoing documents constitute petitioner's appendix to its petition for a writ of certiorari. This page is included pursuant to Supreme Court Rules 14.2 and 33.6.

February, 1990

Jonathan R. Harkavy
Smith, Patterson, Follin,
Curtis, James, Harkavy
& Lawrence
P.O. Drawer Y
Greensboro, NC 27402
(919) 274-2992

Counsel of Record for
Petitioner